

**SEP 27 2005****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS****FOR THE NINTH CIRCUIT****UNITED STATES OF AMERICA,****Plaintiff - Appellee,****v.****LEO NICHOLAS GASGA-AMAYA,****Defendant - Appellant.****No. 04-50489****D.C. No. CR-04-00384-WQH****MEMORANDUM\***

**Appeal from the United States District Court  
for the Southern District of California  
William Q. Hayes, District Judge, Presiding**

**Submitted September 12, 2005\*\***

**Before: REINHARDT, RYMER and HAWKINS, Circuit Judges.**

**Leo Nicolas Gasga-Amaya appeals from a 27-month sentence imposed  
following his guilty plea to being a deported alien in violation of 8 U.S.C. § 1326.**

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\* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

\*\* This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Gasga-Amaya contends that his 41-month sentence exceeded the statutory maximum allowed under *Apprendi v. New Jersey*, 530 U.S. 46 (2000), because he did not admit, and the government did not prove to a jury, his prior aggravated felony conviction, which the court used to increase his term pursuant to 8 U.S.C. § 1326(b)(2) and the United States Sentencing Guidelines. This contention is foreclosed by this court's case law. *See United States v. Moreno-Hernandez*, No. 03-30387, - F.3d -, 2005 WL 1964483,\*8 n.8 (9th Cir. August 17, 2005) (explaining that a district judge's enhancement of a sentence, based on the fact of a prior conviction under U.S.S.G. § 2L1.2, does not raise any Sixth Amendment problems).

Because Gasga-Amaya was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether the sentence imposed would have been materially different had the district court known that the Guidelines were advisory, we remand to the sentencing court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). *See Moreno Hernandez at \*9* (extending *Ameline's* limited remand procedure to cases involving non-constitutional *Booker* error).

**REMANDED.**<sup>1</sup>

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<sup>1</sup> On remand the district court should also correct the judgment to exclude the reference to 8 U.S.C. § 1326(b)(2). *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000).